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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 PHIL DAVID WIZAR,

12 Plaintiff,

13 v.

14 NANCY A BERRYHILL, Acting
15 Commissioner of Social Security,

16 Defendant.

Case No. 2:17-cv-01843-KES

MEMORANDUM OPINION
AND ORDER

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18 Plaintiff Phil David Wizar (“Plaintiff”) appeals the final decision of the
19 Social Security Commissioner denying his application for Disability Insurance
20 Benefits (“DIB”) under Title II of the Social Security Act. For the reasons
21 discussed below, the Commissioner’s decision is AFFIRMED.

22 **I.**

23 **BACKGROUND**

24 Plaintiff filed his DIB application on March 12, 2014. Administrative
25 Record (“AR”) 130. He later alleged a disability onset date of March 13, 2014. AR
26 30. Plaintiff met the disability insured status requirements of the Social Security
27 Act as of his alleged disability onset date, and was insured through March 31, 2015.
28 AR 17, 156-59.

1 The Commissioner denied the application initially, and in September 2014,
2 Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). AR 83-
3 84. On May 20, 2016, the ALJ conducted a hearing at which Plaintiff, who was
4 represented by an attorney, appeared and testified. AR 27-65. The ALJ issued an
5 unfavorable decision on June 23, 2016. AR 12-26.

6 The ALJ found that Plaintiff suffers from the severe impairment of seizure
7 disorder. AR 17. Despite this impairment, the ALJ found that Plaintiff retained the
8 residual functional capacity (“RFC”) to perform work at all exertional levels, but
9 restricted him against climbing, working at unprotected heights, working with
10 moving machinery, and driving. AR 19.

11 Based on this RFC and the testimony of a vocational expert (“VE”), the ALJ
12 found that Plaintiff could perform his past relevant work as an assistant retail
13 manager, meat clerk, stock clerk, small products assembler, and bagger, because
14 these jobs do not require tasks potentially hazardous to someone prone to seizures.
15 AR 21. The ALJ therefore concluded that Plaintiff was not disabled. AR 22.

16 II.

17 PROCEDURES AND STANDARDS

18 A. The Evaluation of Disability.

19 A person is “disabled” for purposes of receiving Social Security benefits if he
20 is unable to engage in any substantial gainful activity owing to a physical or mental
21 impairment that is expected to result in death or which has lasted, or is expected to
22 last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A);
23 Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). A claimant for disability
24 benefits bears the burden of producing evidence to demonstrate that he was
25 disabled within the relevant time period. Johnson v. Shalala, 60 F.3d 1428, 1432
26 (9th Cir. 1995).

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1 **B. The Five-Step Evaluation Process.**

2 The ALJ follows a five-step sequential evaluation process in assessing
3 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Lester
4 v. Chater, 81 F.3d 821, 828 n. 5 (9th Cir. 1996). In the first step, the Commissioner
5 must determine whether the claimant is currently engaged in substantial gainful
6 activity; if so, the claimant is not disabled and the claim must be denied. 20 C.F.R.
7 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

8 If the claimant is not engaged in substantial gainful activity, the second step
9 requires the Commissioner to determine whether the claimant has a “severe”
10 impairment or combination of impairments significantly limiting his ability to do
11 basic work activities; if not, the claimant is not disabled and the claim must be
12 denied. Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

13 If the claimant has a “severe” impairment or combination of impairments, the
14 third step requires the Commissioner to determine whether the impairment or
15 combination of impairments meets or equals an impairment in the Listing of
16 Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if
17 so, disability is conclusively presumed and benefits are awarded. Id.
18 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

19 If the claimant’s impairment or combination of impairments does not meet or
20 equal an impairment in the Listing, the fourth step requires the Commissioner to
21 determine whether the claimant has sufficient residual functional capacity to
22 perform his past work; if so, the claimant is not disabled and the claim must be
23 denied. Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant has the burden
24 of proving he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If
25 the claimant meets that burden, a prima facie case of disability is established. Id.

26 If that happens or if the claimant has no past relevant work, the
27 Commissioner then bears the burden of establishing that the claimant is not
28 disabled because he can perform other substantial gainful work available in the

1 national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That
2 determination comprises the fifth and final step in the sequential analysis. Id.
3 §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

4 **C. Standard of Review.**

5 Under 42 U.S.C. § 405(g), a district court may review the Commissioner's
6 decision to deny benefits. The ALJ's findings and decision should be upheld if
7 they are free from legal error and are supported by substantial evidence based on
8 the record as a whole. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389,
9 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
10 evidence means such relevant evidence as a reasonable person might accept as
11 adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v.
12 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than a scintilla, but less
13 than a preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
14 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial
15 evidence supports a finding, the reviewing court "must review the administrative
16 record as a whole, weighing both the evidence that supports and the evidence that
17 detracts from the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
18 720 (9th Cir. 1998). "If the evidence can reasonably support either affirming or
19 reversing," the reviewing court "may not substitute its judgment" for that of the
20 Commissioner. Id. at 720-21.

21 "A decision of the ALJ will not be reversed for errors that are harmless."
22 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is
23 harmless if it either "occurred during a procedure or step the ALJ was not required
24 to perform," or if it "was inconsequential to the ultimate nondisability
25 determination." Stout v. Comm'r of SSA, 454 F.3d 1050, 1055 (9th Cir. 2006).

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Issue Two: Whether the ALJ erred in the evaluation of the medical evidence concerning Plaintiff's seizure disorder under Neurological Listing 11.03.

Issue Three: Whether the ALJ failed to account adequately for the effects of Plaintiff's seizures in the residual functional capacity determination.

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1 Dr. Ziman refilled his anti-seizure medication and recommended that he have his
2 VNS “checked and potentially adjusted.” Id. Dr. Ziman also recommended that he
3 not work “to the point of sleep deprivation which is a trigger for his seizures.” AR
4 206.

5 • April 24, 2009: Plaintiff next visited Dr. Ziman about a year later because
6 he had a seizure at work. AR 201-03. Three weeks earlier, he had obtained a part-
7 time position as an assembler at Hydraulics International, but it required him to rise
8 at 5:00 a.m. and report to work by 6:00 a.m. AR 36-37, 201. He was still actively
9 looking for a full-time job with benefits. AR 201. Dr. Ziman again recommended
10 that he get his VNS checked. Id. Dr. Ziman adjusted his medications, scheduled a
11 follow-up appointment, and cleared him to return to work, so long as he did not
12 operate “press machines.” AR 203, 207.

13 • 2009-2012: Plaintiff lived in Ireland. AR 223. He taught martial arts six
14 hours/day for two to three months for compensation. AR 49-50. He did not have a
15 treating neurology doctor there. AR 226. Instead, his wife, a nurse, had a doctor
16 friend who wrote him prescriptions for his anti-seizure medication. AR 55, 226.

17 • 2012: Plaintiff separated from his wife, such that he was no longer able to
18 obtain prescription anti-seizure medication without a doctor visit. AR 223. He
19 completed a year of college in September 2012. AR 165.

20 • May 2013: Plaintiff was fired from a job at Home Depot after a seizure that
21 caused him to throw toilet paper and slam doors. AR 41, 164, 249, 292.

22 • July 19, 2013: Plaintiff began visiting Olive View Medical Center (“Olive
23 View”) seeking refills of his seizure medication. AR 18, 340-41. At that time, he
24 told his doctors that he had been in Ireland and “didn’t have meds x 6 mo.”
25 AR 341. Those notes indicate Plaintiff was experiencing seizures either once a
26 month or once a week, depending on how often he was taking medication. Id. He
27 was referred to neurology “to continue to monitor [his] seizures and refill [his]
28 medications.” AR 340.

1 • March 13, 2014: Plaintiff's alleged disability onset date (AR 30)
2 corresponds with a visit in March 2014 to Olive View. AR 232. Plaintiff reported
3 that he was "out" of his anti-seizure medication, Lamictal, as of the beginning of
4 March, such that he had been off medications about 1½ weeks. AR 235. He also
5 reported that his last seizure occurred on March 5, 2014, and he also had a seizure
6 about one month earlier while getting off the bus, causing him to fall and bruise his
7 face. Id. He reported that he was taken to Northridge Hospital after that fall, but
8 there are no records from Northridge Hospital in the administrative record. Id. The
9 Olive View staff scheduled an April follow-up appointment. AR 237. They also
10 gave him a four-week schedule for building up his Lamictal dosages. AR 239.

11 • April 11, 2014: Plaintiff attended his follow-up appointment at Olive
12 View. AR 226. He stated that between 2012 and 2014, he was only taking
13 Lamictal "sporadically," and he also acknowledged that when he was not compliant
14 with the Lamictal, he would have a seizure every two or three months. Id. Olive
15 View continued his Lamictal prescription and advised Plaintiff "on the importance
16 of being compliant." AR 228.

17 • June 10, 2014: Plaintiff again visited Olive View for medication refills.
18 AR 214. Notes from this visit say different things about when Plaintiff experienced
19 his last seizure. Compare AR 224 (Plaintiff denied any "interval seizures"), AR
20 225 (last seizure on March 20, 2014), AR 222 (last seizure in April 2014), and AR
21 215 (last seizure was "2 weeks ago"). Plaintiff reported that while taking Lamictal,
22 he had one seizure every six months. AR 223, 225. When not compliant with his
23 medication, he experienced one seizure every two or three months. AR 225.

24 Plaintiff reported that he last took his medication two days prior. AR 216-17.
25 The Olive View staff noted that he was only taking 50 mg of Lamictal "in mistake"
26 instead of 300 mg. AR 215.

27 Plaintiff did not know then if his VNS was working; it had last been
28 interrogated six years ago. AR 222-23. The Olive View staff referred Plaintiff to

1 neurology to check his VNS. AR 216, 225.

2 • August 11, 2014: Consultative examiner Dr. Robert A. Moore conducted a
3 neurological evaluation of Plaintiff. AR 248-54. Plaintiff told Dr. Moore that he
4 “averages four or five [seizures] per month, sometimes more, sometimes less,” and
5 that he “routinely takes his medications.” AR 248. He reported that the seizures
6 “tend to last less than a minute,” during which time he “does not know what is
7 going on around him,” but they are “not associated with postictal confusion.” *Id.*
8 Dr. Moore’s report contains no discussion of Plaintiff’s VNS. It mentions that
9 Plaintiff drove to his appointment. *Id.* Dr. Moore concluded that since Plaintiff
10 was still experiencing seizures despite medication, he should not do work that
11 requires climbing, balancing, driving or using power tools—essentially the same
12 restrictions in the ALJ’s RFC determination. AR 250.

13 • October 7, 2014: Plaintiff returned to Olive View for a medication refill.
14 AR 319-20. Notes from this appointment indicate Plaintiff “requires daily
15 medication for control.” AR 324. At the time, he was instructed to take 100-mg
16 Lamictal tablets “3 tablets by mouth twice a day.” *Id.*

17 • January 2015: Plaintiff told Olive View at a later appointment that in
18 January 2015, a seizure caused him to walk out of his mother’s house and be struck
19 by vehicle; he broke his left leg, requiring surgery. AR 282-83. There are no
20 records reflecting this surgery in the administrative record.

21 • March 31, 2015: This was the last day of Plaintiff’s DIB insured status.
22 AR 17, 156-59.

23 • May 8, 2015: Plaintiff returned to Olive View telling them he had been
24 “out of medication for 6 mo[n]ths.” AR 313. He reported that his “last seizure
25 [was] yesterday, but attributes this to decreased sleep.” AR 311. He “[o]therwise
26 denies any increase in seizure activity.” *Id.* He received a refill of his Lamictal
27 prescription, and again was instructed to take three 100-mg tablets twice daily. AR
28 316.

1 • June 10, 2015: About a month later, Plaintiff returned to Olive View. AR
2 291. This time, he told the medical staff he was experiencing three or four seizures
3 per day over the last six months, which the clinic noted contrasted with “prior
4 notes.” Id. About two or three times each day, his seizures caused him to engage
5 in abnormal behavior he could not remember afterwards, such as leaving the house
6 naked, taking popcorn from strangers at the movie theater, and touching women’s
7 breasts. Id. He gave the staff a letter from his mother describing this (but the letter
8 is not in the administrative record). Id. Plaintiff told the staff that he was not
9 experiencing seizures at a higher rate; rather, he realized that he had been
10 experiencing seizures more frequently than he previously thought after he moved in
11 with his mother and she told him her observations. Id. His mother’s note reported
12 that Plaintiff had suffered facial injuries from his seizures, but Plaintiff told Olive
13 View “he gets a rug burn on his face from falling about once a year, generally in the
14 setting of missing his medications or over exercising.” Id. At this appointment, the
15 medical staff interrogated Plaintiff’s VNS and found it to be at the end of its service
16 life. AR 293.

17 • June 22, 2015: Plaintiff underwent an electroencephalogram (“EEG”) to
18 measure and record electrical activity in his brain. AR 286, 289-90. The test
19 showed “a focal hyperactivity of left temporal lobe which may be the initiating
20 focus of his GTC’s [generalized tonic-clonic seizures].” AR 286. The test
21 assessment concluded, “Long-term EEG monitoring should be entertained to
22 investigate this if further medical therapy and replacement of the VNS fail to
23 control his seizures and fugue states.” Id.

24 • July 7, 2015: Plaintiff underwent a computerized tomography (“CT”) scan
25 of his brain. AR 332. The scan did not reveal any abnormalities. Id.

26 • July 21, 2015: At an Olive View appointment, Plaintiff reported that he
27 was still experiencing three or four seizures per day, and his last seizure occurred at
28 8:00 that morning. AR 282. Treatment notes reflect that an “e-consult to USC for

1 evaluation of a new VNS as well as long-term EEG monitoring at USC planned last
2 time did not go through” Id. Also on this date, Dr. Christopher Degiorgio of
3 Olive View drafted a letter on Plaintiff’s behalf indicating that “despite adequate
4 treatment [he] still suffers debilitating seizures multiples times a day.” AR 255.

5 • August 11, 2015: Later treating notes reference an Olive View appointment
6 on this date. AR 276; 281. Treatment notes state that Plaintiff failed to keep an
7 appointment at USC for a surgical consultation about his VNS. AR 281. The
8 administrative record does not contain any records showing that his VNS unit was
9 replaced.

10 • September 2, 2015: At an Olive View appointment, Plaintiff reported that
11 he had had four seizures since August 11, 2015, despite medical compliance. AR
12 276. The notes recorded this as an improvement, because he had been
13 “[p]reviously having seizures daily.” Id. Plaintiff was offered a referral for mental
14 health treatment, but he declined it. AR 278.

15 • October 14, 2015: At an Olive View appointment, Plaintiff reported that he
16 was having seizures 2-3 times per day, but his last seizure was 2 days ago in the
17 bus. AR 274. The notes say that “on last visit his L[a]mictal and [K]eppra dosage
18 have been increased but still he is experiencing the GTC seizures.” Id.

19 • February 23, 2016: Plaintiff reported to the Olive View Emergency Room
20 that he had “no meds x 4 mo.” AR 260. His last seizures were “today and
21 yesterday,” and he wanted a medication refill. Id.

22 • March 31, 2016: Plaintiff again had “an abnormal EEG due to left temporal
23 slowing and left temporal sharps,” consistent with “a focal seizure disorder.” AR
24 344.

25 • April 20, 2016: Plaintiff underwent another brain CT scan. AR 342. This
26 scan showed “encephalomalacia within the gyrus recti, bilaterally and greater on
27 the right. This lies in a location typical for sequelae of trauma and correlation with
28

1 clinical history recommended.”² AR 342-43.

2 • May 20, 2016: At the administrative hearing, Plaintiff testified that he had
3 seizures “two to three times a day,” but sometimes “more or less.” AR 43. He later
4 testified that it was “never really less.” AR 48. He testified that he had seizures
5 with that same level of frequency his whole life since he was diagnosed with a
6 seizure disorder at age nine. AR 44-45. He later testified the frequency was getting
7 worse since 2009 or 2010. AR 47-48. He initially testified that he had “always”
8 been compliant with his medication, but he later explained that when he lost his
9 insurance benefits, he did not have his medications until he learned about the clinic
10 at Olive View. AR 45-46.

11 V.

12 DISCUSSION

13 A. Issue One: The ALJ’s Evaluation of Plaintiff’s Testimony.

14 1. **Rules for Evaluating Subjective Symptom Testimony.**

15 It is the ALJ’s role to evaluate the claimant’s testimony regarding subjective
16 pain or symptoms. See Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).³
17 “[T]he ALJ is not required to believe every allegation of disabling pain, or else
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19 ² “Encephalomalacia” is a softening of brain tissue, usually associated with a
20 traumatic injury or restricted blood flow. See https://en.wikipedia.org/wiki/Cerebral_softening. The “gyrus recti” refers to a portion of the brain’s frontal lobe.
21 See https://en.wikipedia.org/wiki/Straight_gyrus.

22 ³ On March 16, 2016, the Social Security Administration (“SSA”) published
23 Social Security Ruling 16-3p, 2016 SSR LEXIS 4 (“SSR 16-3p”), which eliminated
24 use of the term “credibility” from SSA sub-regulatory policy. SSR 16-3p was
25 republished on October 25, 2017 with the revision that the ruling was “applicable
26 on March 28, 2016.” See 82 Fed. Reg. 49462, 49468 & n.27 (Oct. 25, 2017).
27 Here, the ALJ issued her opinion on June 23, 2016, such that SSR 16-3p was in
28 effect. AR 12-26. The Ninth Circuit recently noted that SSR 16-3p is consistent
with its prior precedent. Trevizo v. Berryhill, 871 F.3d 664, 678 n.5 (9th Cir. 2017)
(SSR 16-3p “makes clear what [Ninth Circuit] precedent already required”).
Accordingly, citation to earlier case law is appropriate.

1 disability benefits would be available for the asking, a result plainly contrary to
2 42 U.S.C. § 423(d)(5)(A).” Id. at 1112 (internal quotation marks omitted). An
3 ALJ’s assessment of symptom severity is entitled to “great weight.” Weetman v.
4 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989).

5 If an individual alleges impairment-related symptoms, the ALJ must evaluate
6 those symptoms using a two-step process. First, “the ALJ must determine whether
7 the claimant has presented objective medical evidence of an underlying impairment
8 ‘which could reasonably be expected to produce the pain or other symptoms
9 alleged.’” Treichler v. Comm’r of SSA, 775 F.3d 1090, 1102 (9th Cir. 2014)
10 (quoting Lingenfelter, 504 F.3d at 1036) (internal quotation marks omitted). If so,
11 the ALJ may not reject a claimant’s testimony “simply because there is no showing
12 that the impairment can reasonably produce the degree of symptom alleged.”
13 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in original).

14 Second, if the claimant meets the first test, the ALJ may discredit the
15 claimant’s subjective symptom testimony only upon making specific findings that
16 support the conclusion. Berry v. Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010); see
17 also 20 C.F.R. §404.1529(c)(1) (“When the medical signs or laboratory findings
18 show that [a claimant has] a medically determinable impairment(s) that could
19 reasonably be expected to produce [his or her] symptoms, such as pain, [the
20 Commissioner] must then evaluate the intensity and persistence of [the claimant’s]
21 symptoms”). If the ALJ finds testimony as to the severity of a claimant’s pain
22 and impairments is unreliable, then the ALJ must make findings “sufficiently
23 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
24 claimant’s testimony.” Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002);
25 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015). Absent a finding or
26 affirmative evidence of malingering, the ALJ must provide “clear and convincing”
27 reasons for rejecting the claimant’s testimony. Lester, 81 F.3d at 834; Ghanim v.
28 Colvin, 763 F.3d 1154, 1163 & n.9 (9th Cir. 2014).

1 In assessing the intensity and persistence of symptoms, the ALJ must
2 consider a claimant's work record, observations of medical providers and third
3 parties with knowledge of claimant's limitations, aggravating factors, functional
4 restrictions caused by symptoms, effects of medication, and the claimant's daily
5 activities. Smolen, 80 F.3d at 1283-84 & n.8; SSR 16-3p, 2016 SSR LEXIS 4, at
6 *10 (“[The Commissioner] examine[s] the entire case record, including the
7 objective medical evidence; an individual's statements ...; statements and other
8 information provided by medical sources and other persons; and any other relevant
9 evidence in the individual's case record.”). “Although lack of medical evidence
10 cannot form the sole basis for discounting pain testimony,” ALJs may consider that
11 factor in their analysis. Burch, 400 F.3d at 681. ALJs may also consider
12 inconsistency in the claimant's statements. Ghanim, 763 F.3d at 1163; SSR 16-3p,
13 2016 SSR LEXIS 4, at *21 (“[The Commissioner] will compare statements an
14 individual makes in connection with the individual's claim for disability benefits
15 with any existing statements the individual made under other circumstances.”).

16 If the ALJ's findings are supported by substantial evidence in the record,
17 courts may not engage in second-guessing. Thomas, 278 F.3d at 959.

18 **2. The ALJ's Evaluation of Plaintiff's Testimony.**

19 The ALJ accepted that Plaintiff has a seizure disorder, but found that
20 Plaintiff's statements concerning the “intensity, persistence and limiting effects” of
21 his seizures are “not entirely consistent with the medical evidence and other
22 evidence of record” AR 20. Instead, the ALJ found Plaintiff had “exaggerated”
23 the severity of his disorder. AR 21.

24 The ALJ gave several reasons for this finding. First, he cited the fact that
25 “the claimant has given inconsistent statements regarding his regular compliance
26 with his anti-seizure medications and the frequency and intensity of his seizures.”
27 AR 21. Second, the ALJ found “there is no indication the claimant's seizure
28 condition negatively impacts his ability to care for himself, perform household

1 chores, daily activities, and other such activities.” Id. The ALJ cited Plaintiff’s
2 ongoing volunteer work teaching martial arts to children, saying “[p]resumably, if
3 the claimant was so fearful of his seizures and their impact on his ability to function
4 and be around others, he would not engage in such a strenuous physical activity
5 such as martial arts requiring close, physical contact with others, particularly
6 children.” Id. Third, the ALJ found that Plaintiff’s testimony was inconsistent with
7 his medical records. AR 20.

8 **3. The ALJ Gave Clear and Convincing Reasons for Finding**
9 **Plaintiff’s Testimony Inconsistent with the Evidence of Record.**

10 a. Reason One: Plaintiff’s Inconsistent Statements.

11 The record supports the ALJ’s finding that Plaintiff made inconsistent
12 statements regarding his compliance with taking his anti-seizure medication. See
13 SSR 16-3p, 2016 SSR LEXIS 4, at *21 (“[The Commissioner] will consider the
14 consistency of the [claimant’s] own statements.”). At the hearing, he testified that
15 he had been compliant with his prescriptions since learning that he could refill them
16 at the Olive View clinic. AR 45-46. His first treating records from Olive View are
17 from July 2013. AR 341. His next treating records are from March 2014, at which
18 time he stated he was “out” of his anti-seizure medication and been without it for
19 about 1½ weeks. AR 235. In April 2014, he advised that between 2012 and 2014,
20 he was only taking Lamictal “sporadically.” AR 226. In June 2014, he stated he
21 had gone two days without medication, and the Olive View staff determined he was
22 mistakenly taking a dosage that was too low. AR 215-17. In May 2015, he had
23 been out of medication for six months, AR 313, and in February 2016, he reported
24 to the emergency room that he had “no meds x 4 mo[nths].” AR 260.

25 The record also supports the ALJ’s finding that Plaintiff made inconsistent
26 statements regarding the frequency of his seizures. At the hearing, he testified he
27 had experienced two or three seizures every day since 2009 or 2010. AR 43-44, 47-
28 48. In July 2013, however, he told his doctors that he experienced seizures only

1 once a month or once a week, depending on his medication compliance. AR 340-
2 41. On March 13, 2014, he identified his last two seizures as occurring on March 5,
3 2014, and about one month earlier. AR 235. In April 2014, he reported that he had
4 one seizure every two or three months. AR 226. In June 2014, he made varying
5 statements about his most recent seizures, but regardless of which account is
6 accepted, they had occurred either weeks or months earlier. AR 215, 222, 224-25.
7 When he saw Dr. Moore in August 2014, he reported averaging four or five
8 seizures a month. AR 248. In May 2015, he denied any increase in seizure
9 activity. AR 311. By that point, his insured status for DIB had already lapsed in
10 March 2015.⁴ AR 17, 156-59. Finally, in June 2015, he reported having three or
11 four seizures per day over the past six months, despite his earlier statements. AR
12 291.

13 Plaintiff's medication compliance and the frequency of his seizures are both
14 key facts when considering whether his seizure disorder is disabling. The ALJ did
15 not error by citing Plaintiff's inconsistent statements on these topics as a reason to
16 find he was exaggerating the disabling effects of his seizures.

17 b. Reason Two: Inconsistency with Plaintiff's Activities.

18 Plaintiff testified that he still volunteers teaching martial arts. AR 50-51. He
19 teaches three or four-hour classes at Team Karate Centers with students age six to
20 eight. AR 51, 53. When asked how he could do this while suffering from a seizure
21

22 ⁴ Plaintiff asserts that "medical records since March, 2014 support Plaintiff's
23 testimony that he experienced multiple seizures despite medication compliance."
24 (JS at 19.) No medical records created between March 2014 and the March 2015
25 expiration of Plaintiff's DIB insured status, however, support Plaintiff's testimony
26 that he experienced multiple seizures every day even when taking his medication.
27 That is the timeframe relevant to the ALJ's decision. Tidwell v. Apfel, 161 F.3d
28 599, 601 (9th Cir. 1998) ("To be entitled to disability benefits, Appellant must
establish that her disability existed on or before [the] date [her insured status
expired].").

1 disorder, he responded that he makes sure he gets enough sleep the nights before he
2 teaches. AR 52. Plaintiff testified, however, that even when he gets enough sleep,
3 he still has two or three seizures every day. Id. When the ALJ asked how he could
4 safely be responsible for children despite the possibility of having a seizure while
5 leading a class, he responded, “I don’t know. I mean I can, though.” AR 52.

6 Plaintiff testified that he has experienced seizures while teaching martial arts,
7 but he could not estimate how many. AR 53-54. He confirmed that he sometimes
8 acts oddly while having seizures, such as taking off his clothes or touching people
9 inappropriately, but this has not prevented him from volunteering with kids.
10 AR 57. He testified that when he has a seizure while teaching, he “can just sit
11 down” and “zone out” for about thirty seconds. AR 53. When the seizure ends, he
12 “just go[es] back to the regular thing of teaching.” Id.

13 Plaintiff argues that his seizure disorder is “episodic” in nature, such that his
14 testimony that he has multiple seizures every day, during which he can engage in
15 bizarre behavior, is not inconsistent with his ability to care for himself, perform
16 household chores, and teach martial arts to children. (JS at 21.) While Plaintiff’s
17 seizure disorder is clearly episodic, the relevant question is whether it precludes
18 him from working. The ALJ did not err in reasoning that if his seizures are not so
19 frequent that they preclude him from caring for his mother and teaching martial
20 arts, then they should not preclude him from working as stock clerk or bagger.
21 Ghanim, 763 F.3d at 1165 (“Engaging in daily activities that are incompatible with
22 the severity of symptoms alleged can support an adverse credibility
23 determination.”); see 20 C.F.R. 404.1529(c)(3); 416.929(c)(3).

24 c. Reason Three: Lack of Corroborating Medical Records.

25 Plaintiff argues that his irregular EEG tests in June 2015 and March 2016
26 along with his CT scan in April 2015 all corroborate his testimony. (JS at 19.)
27 Each of these tests was conducted after Plaintiff’s last insured date in March 2015,
28 and Respondent contends that they establish only that Plaintiff suffers from a

1 ///

2 seizure disorder without shedding light on the frequency or severity of his
3 seizures. (JS at 12.)

4 In June 2015, Plaintiff reported a dramatic increase in the number of seizures
5 he was experiencing, i.e., from a few over the course of a months to a few every
6 day. Compare AR 248, 313 and AR 291. The ALJ properly considered that the
7 EEG scans in 2015 and 2016 showed no changes in Plaintiff's condition that would
8 account for his testimony that his seizure activity dramatically increased. AR 20.
9 Both EEG scans revealed abnormalities, but essentially the same abnormalities.
10 Compare AR 286, 289-90 and AR 344.

11 The ALJ also correctly reasoned that if Plaintiff were truly experiencing
12 multiple seizures every day, one would expect to see medical records for his
13 resulting injuries. AR 20. For example, Plaintiff testified that he fell down some
14 stairs and along a "wash" while jogging and "was in blood" (AR 43), he was kicked
15 and punched by a bus passenger and left in the street by the driver after he touched
16 a woman's breast (AR 58), he fell getting off the bus and was taken to Northridge
17 Hospital (AR 235), and he walked out of his house into the street where he was
18 struck by a vehicle, causing him to have surgery for a broken leg. AR 282-83.
19 There are no treating records corroborating any of this in the administrative record.
20 The ALJ did not err in citing this fact as a reason to discount Plaintiff's testimony.

21 **B. Issue Two: Listing 11.03.**

22 **1. The ALJ's Step Three Analysis.**

23 Neurological Listing 11.03 (in effect on the date of Plaintiff's disability
24 application and through the date of the ALJ's decision), provided as follows:
25 "Epilepsy-nonconvulsive epilepsy (petit mal, psychomotor, or focal), documented
26 by detailed description of a typical seizure pattern including all associated
27 phenomena, occurring more than once weekly in spite of at least 3 months of
28 prescribed treatment. With alteration of awareness or loss of consciousness and

1 transient postictal manifestations of unconventional behavior or significant
2 interference with activity during the day.” (JS at 4; Program Operations Manual
3 System, DI 34131.013 “Neurological Listings from 12/15/04 to 09/28/16,”
4 available at <https://secure.ssa.gov/poms.nsf/lnx/0434131013> (last visited January
5 10, 2018).)

6 The ALJ found that Plaintiff’s seizure disorder did not satisfy Listing 11.03
7 because it “has not resulted in the requisite documented episodes of seizures
8 occurring more frequently than once weekly in spite of at least 3 months of
9 prescribed treatment” AR 19.

10 **2. The ALJ’s Step Three Analysis is Free of Legal Error.**

11 Plaintiff argues that after March 2014, Olive View “medical records indicate
12 that the frequency of Plaintiff’s seizures further increased to three to four per day,
13 despite medication compliance. (AR 274, 276, 282, 289, 291, 345).” (JS at 4.)

14 In fact, the cited 2015 records do not so indicate. AR 274 (on 10/14/15,
15 Plaintiff reported seizures “2-3 times a day” but his last seizure was “2 days ago”);
16 AR 276 (on 9/2/15, Plaintiff reported “4 seizures since last neuro clinic” on
17 8/11/15); AR 282 (on 7/21/15, Plaintiff reported “3-4 seizures a day,” but a planned
18 “e-consult” for VNS evaluation “did not go through”); AR 289 (6/22/15 EEG
19 results note that Plaintiff is reporting “three to four daily” seizures); AR 291
20 (6/10/15 appointment at which Plaintiff reported “3-4 seizures per day” but also
21 learned that his VNS was no longer working and that seizures cause him to fall
22 “about once a year, generally in the setting of missing his medications or over
23 exercising”). In May 2015, Plaintiff stated to his doctors that he had been “out of
24 medication for 6 months,” AR 313, and he stated again in February 2016 that he
25 had “no meds x 4 mo[nths].” AR 260. Thus, even in 2015, Plaintiff was neither
26 taking his prescribed medication daily, nor did he have a functioning VNS. As
27 discussed above, the only evidence that Plaintiff ever experienced 3-4 seizures a
28 day is his own reporting, and the ALJ gave clear and convincing reasons for finding

1 that he was exaggerating.

2 The ALJ's finding that Plaintiff's seizures did not occur before the expiration
3 of his insured status with sufficient frequency, despite medical compliance, to
4 satisfy Listing 11.03 is supported by the record. AR 235 (Plaintiff ran out of
5 medication in March 2014); AR 216-17 (Plaintiff missed two days of medication in
6 June 2014); AR 313 (Plaintiff was out of medication for six months in 2014-2015);
7 AR 223-25 (while taking Lamictal, Plaintiff reported one seizure every six months).

8 **C. Issue Three: The ALJ's RFC Determination.**

9 **1. Rules for Determining a Claimant's RFC.**

10 A claimant's RFC is "the most" that a claimant can do despite his limitations.
11 20 C.F.R. § 404.1545(a). It is "based on all the relevant medical and other evidence
12 in [the] case record." *Id.*; see Batson v. Comm'r of SSA, 359 F.3d 1190, 1197-98
13 (9th Cir. 2003). The ALJ must consider the total limiting effects caused by
14 medically determinable impairments and the claimant's subjective pain. Garrison
15 v. Colvin, 759 F.3d 995, 1011 (9th Cir. 2014) (citing 20 C.F.R. § 416.920(e)). The
16 RFC need not parrot the opinion of any particular doctor, but rather, "the ALJ is
17 responsible for translating and incorporating clinical findings into a succinct RFC."
18 Rounds v. Comm'r of SSA, 807 F.3d 996, 1006 (9th Cir. 2015); see also Stubbs-
19 Danielson v. Astrue, 539 F.3d 1169, 1174 (9th Cir. 2008).

20 **2. The ALJ's RFC Determination is Free of Legal Error.**

21 The VE testified that if an individual would be off task "two or three times a
22 day," and during that time the individual might be engaged in bizarre, inappropriate
23 behavior, then there would be no work for that individual. AR 63. Plaintiff argues
24 that the medical evidence establishes that this hypothetical describes him, such that
25 the ALJ erred in not including these limitations in his RFC determination. (JS at 31
26 ["the ALJ's RFC finding did not account for the effects of episodes of bizarre
27 inappropriate behavior associated with seizures ..."].)

28 Here, the ALJ reasonably accounted for Plaintiff's seizure disorder by

1 including appropriate seizure precautions in his RFC, such as prohibitions against
2 climbing and driving. AR 19. These restrictions were supported by the opinion of
3 examining neurologist, Dr. Moore. AR 250.

4 The ALJ was not required to account for occasional episodes of bizarre
5 behavior claimed by Plaintiff, because Plaintiff did not provide evidence of these
6 episodes beyond his own testimony, which the ALJ appropriately discounted, as
7 discussed above. Plaintiff did not, for example, provide statements from his
8 mother, anyone at Team Karate Centers, or his prior employer, Home Depot.
9 “Because Plaintiff’s alleged limitations were not supported by the record, the ALJ
10 did not err by not including them in the RFC.” Nettles v. Colvin, 12-cv-9670-JPR,
11 2014 U.S. Dist. LEXIS 12512, at *41 (C.D. Cal. Jan. 31, 2014) (citing Bayliss v.
12 Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005)).

13 **VI.**

14 **CONCLUSION**

15 For the reasons stated above, IT IS ORDERED that judgment shall be
16 entered AFFIRMING the decision of the Commissioner denying benefits.

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18
19 DATED: January 16, 2018

Karen E. Scott

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21 KAREN E. SCOTT
22 United States Magistrate Judge
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